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CRIMINAL LAW ISSUES

RING v. ARIZONA, No. 01-488, ___ U.S. ___, ___ S. Ct. ___, 2002 WL 1357257 (June 24, 2002).

GINSBURG, J.

> Under Arizona law, Ring could not be sentenced to death, the statutory maximum penalty for first-degree murder, unless further findings were made. The State's first-degree murder statute prescribes that the offense "is punishable by death or life imprisonment as provided by §13—703." [Citation omitted.] The cross-referenced section, §13—703, directs the judge who presided at trial to "conduct a separate sentencing hearing to determine the existence or nonexistence of [certain enumerated] circumstances … for the purpose
> of determining the sentence to be imposed." [Citation omitted.] The statute further instructs: "The hearing shall be conducted before the court alone. The court alone shall make all factual determinations required by this section or the constitution of the United States or this state." [Citation omitted.]
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> . . . .
>
> For the reasons stated, we hold that *Walton* [*v. Arizona*, 497 U.S. 639 (1990)] and *Apprendi* [*v. New Jersey*, 530 U.S. 466 (2000)] are irreconcilable; our Sixth Amendment jurisprudence cannot be home to both. Accordingly, we overrule *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. [Citation omitted.] . . .
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> . . . .

KENNEDY, SCALIA, SOUTER, STEVENS, and THOMAS, JJ., concurred.
SCALIA, J., also filed a separate written opinion in which he concurred and in which Thomas, J., joined.
KENNEDY, J., also filed a separate written opinion in which he concurred.
BREYER, J., filed a separate written opinion in which he concurred in the judgment.
O'CONNER, J., filed a separate written opinion in which she dissented and in which REHNQUIST, C. J., joined.

HARRIS v. UNITED STATES, No. 00-10666, ___ U.S. ____, ___ S. Ct. ____, 2002 WL 1357277 (June 24, 2002).

KENNEDY, J.

> Once more we consider the distinction the law has drawn between the elements of a crime and factors that influence a criminal sentence. Legislatures define crimes in terms of

the facts that are their essential elements, and constitutional guarantees attach to these facts. In federal prosecutions, "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury" alleging all the elements of the crime. U.S. Const., Amdt. 5; see *Hamling* v. *United States,* 418 U.S. 87 , 117 (1974). "In all criminal prosecutions," state and federal, "the accused shall enjoy the right to … trial … by an impartial jury," U.S. Const., Amdt. 6; see *Duncan* v. *Louisiana,* 391 U.S. 145 , 149 (1968), at which the government must prove each element beyond a reasonable doubt, see *In re Winship,* 397 U.S. 358 , 364 (1970).

Yet not all facts affecting the defendant's punishment are elements. After the accused is convicted, the judge may impose a sentence within a range provided by statute, basing it on various facts relating to the defendant and the manner in which the offense was committed. Though these facts may have a substantial impact on the sentence, they are not elements, and are thus not subject to the Constitution's indictment, jury, and proof requirements. Some statutes also direct judges to give specific weight to certain facts when choosing the sentence. The statutes do not require these facts, sometimes referred to as sentencing factors, to be alleged in the indictment, submitted to the jury, or established beyond a reasonable doubt.

The Constitution permits legislatures to make the distinction between elements and sentencing factors, but it imposes some limitations as well. For if it did not, legislatures could evade the indictment, jury, and proof requirements by labeling almost every relevant fact a sentencing factor. The Court described one limitation in this respect two Terms ago in *Apprendi* v. *New Jersey,* 530 U.S. 466 , 490 (2000): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum," whether the statute calls it an element or a sentencing factor, "must be submitted to a jury, and proved beyond a reasonable doubt." Fourteen years before, in *McMillan* v. *Pennsylvania,* 477 U.S. 79 (1986), the Court had declined to adopt a more restrictive constitutional rule*. McMillan* sustained a statute that increased the minimum penalty for a crime, though not beyond the statutory maximum, when the sentencing judge found, by a preponderance of the evidence, that the defendant had possessed a firearm.

The principal question before us is whether *McMillan* stands after *Apprendi*.

Petitioner William Joseph Harris sold illegal narcotics out of his pawnshop with an unconcealed semiautomatic pistol at his side. He was later arrested for violating federal drug and firearms laws, including 18 U.S.C. § 924 (c)(1)(A). That statute provides in relevant part:

> "[A]ny person who, during and in relation to any crime of violence or drug trafficking crime … uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime–
>
> "(i) be sentenced to a term of imprisonment of not less than 5 years;
>
> "(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> "(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years."

The Government proceeded on the assumption that §924(c)(1)(A) defines a single crime and that brandishing is a sentencing factor to be considered by the judge after the trial. For this reason the indictment said nothing of brandishing and made no reference to subsection (ii). Instead, it simply alleged the elements from the statute's principal paragraph: that "during and in relation to a drug trafficking crime," petitioner had "knowingly

carr[ied] a firearm." At a bench trial the United States District Court for the Middle District of North Carolina found petitioner guilty as charged.

. . . .

So we begin our analysis by asking what §924(c)(1)(A) means. The statute does not say in so many words whether brandishing is an element or a sentencing factor, but the structure of the prohibition suggests it is the latter. Federal laws usually list all offense elements "in a single sentence" and separate the sentencing factors "intsubsections." [Citation omitted.]

. . . .

We might have had reason to question that inference if brandishing or discharging altered the defendant's punishment in a manner not usually associated with sentencing factors. *Jones* is again instructive. There the Court accorded great significance to the "steeply higher penalties" authorized by the carjacking statute's three subsections, which enhanced the defendant's maximum sentence from 15 years, to 25 years, to life–enhancements the Court doubted Congress would have made contingent upon judicial factfinding. 526 U.S., at 233; see also *Castillo, supra*, at 131; *Almendarez-Torres*, *supra*, at 235—236. The provisions before us now, however, have an effect on the defendant's sentence that is more consistent with traditional understandings about how sentencing factors operate; the required findings constrain, rather than extend, the sentencing judge's discretion. Section 924(c)(1)(A) does not authorize the judge to impose "steeply higher penalties"–or higher penalties at all–once the facts in question are found. Since the subsections alter only the minimum, the judge may impose a sentence well in excess of seven years, whether or not the defendant brandished the firearm. The incremental changes in the minimum–from 5 years, to 7, to 10–are precisely what one would expect to see in provisions meant to identify matters for the sentencing judge's consideration.

This conclusion might be questioned if there were extensive historical evidence showing that facts increasing the defendant's minimum sentence (but not affecting the maximum) have, as a matter of course, been treated as elements. The evidence on this score, however, is lacking. . . .

. . . .

REHNQUIST, C. J. and BREYER, O'CONNOR, and SCALIA, JJ., joined with respect to Parts I, II, and IV.

REHNQUIST, C. J. and O'CONNOR, and SCALIA, JJ., joined with respect to Part III.

O'CONNOR, J., filed a separate written opinion in which she concurred, in part as follows:

Petitioner bases his statutory argument that brandishing must be interpreted as an offense element on *Jones* v. *United States,* 526 U.S. 227 (1999). He bases his constitutional argument that regardless of how the statute is interpreted, brandishing must be charged in the indictment and found by the jury beyond a reasonable doubt on *Apprendi* v. *New Jersey,* 530 U.S. 466 (2000). As I dissented in *Jones* and *Apprendi* and still believe both were wrongly decided, I find it easy to reject petitioner's arguments. Even assuming the validity of *Jones* and *Apprendi*, however, I agree that petitioner's arguments that brandishing must be charged in the indictment and found by the jury beyond a reasonable doubt are unavailing. I therefore join Justice Kennedy's opinion in its entirety.

BREYER, J., filed a separate written opinion in which he concurred in part and in which he concurred in the judgment, in part, as follows:

I cannot easily distinguish *Apprendi* v. *New Jersey,* 530 U.S. 466 (2000), from this case in terms of logic. For that reason, I cannot agree with the plurality's opinion insofar as it finds such a distinction. At the same time, I continue to believe that the Sixth Amendment permits judges to apply sentencing factors–whether those factors lead to a sentence beyond the statutory maximum (as in *Apprendi*) or the application

of a mandatory minimum (as here). And because I believe that extending *Apprendi* to mandatory minimums would have adverse practical, as well as legal, consequences, I cannot yet accept its rule. I therefore join the Court's judgment, and I join its opinion to the extent that it holds that *Apprendi* does not apply to mandatory minimums.

. . . .

THOMAS, J., filed a separate written opinion in which he dissented, and in which GINSBURG, SOUTER, and STEVENS, JJ., joined, in part, as follows:

The range of punishment to which petitioner William J. Harris was exposed turned on the fact that he brandished a firearm, a fact that was neither charged in his indictment nor proved at trial beyond a reasonable doubt. The United States Court of Appeals for the Fourth Circuit nonetheless held, in reliance on *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), that the fact that Harris brandished a firearm was a mere sentencing factor to which no constitutional protections attach. 243 F.3d 806, 808—812 (2001).

McMillan, however, conflicts with the Court's later decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), as the dissenting opinion in *Apprendi* recognized. See *id.,* at 533 (O'Connor, J., dissenting). The Court's holding today therefore rests on either a misunderstanding or a rejection of the very principles that animated *Apprendi* just two years ago. Given that considerations of *stare decisis* are at their nadir in cases involving procedural rules implicating fundamental constitutional protections afforded criminal defendants, I would reaffirm *Apprendi*, overrule *McMillan*, and reverse the Court of Appeals.

. . . .

SMITH v. STATE, No. 29S02-0107-PC-337, ___ N.E.2d ___ (Ind. June 21, 2002).

SULLIVAN, J.

On October 18, 1996, Defendant stole a checkbook from Horace Harvey, his then-grandparent-in-law. This checkbook was for a bank account that Mr. Harvey held in trust for his sister, Geraldine Harvey. Defendant proceeded to write out six checks to himself and forged Mr. Harvey's signature. Over the course of three hours in the afternoon of October 18, Defendant deposited these six checks into his Bank One account, going to six different branches in Marion County. The amount of money stolen from Horace and Geraldine Harvey amounted to over $17,000.

. . . .

The Court of Appeals held that Smith's guilty plea was "unintelligent" and therefore invalid on two grounds. First, he had not been advised by counsel or the court that if he did not plead guilty and went to trial he could only be convicted of one count of theft (rather than the six with he was charged) because in stealing a single checkbook he had only committed "one larceny." Second, he had not been advised by counsel or the court that if he did not plead guilty and went to trial the maximum sentence he could receive for one count of theft and six counts of forgery was limited to ten years (compared to the maximum of twenty authorized by the plea) under Indiana Code § 35-50-1-2(b) because the conduct constituted a "single episode of criminal conduct." [Footnote omitted.] [Citation omitted.]

. . . .

We granted transfer in this case to address whether certain conduct with which Smith was charged constitutes a "single episode of criminal conduct" under Indiana Code § 35-50-1-2(b) (1996 Supp.). . . . [W]here a defendant's crimes amount to a "single episode of criminal conduct," the trial court cannot not impose consecutive sentences greater than the presumptive sentence for a felony which is "one (1) class of felony higher than the most serious of the felonies for which the person has been convicted." §35-50-1-2(c). [Footnote omitted.]

. . . .

The Court of Appeals discussed this provision in Tedlock v. State, 656 N.E.2d 273, 275 (Ind. Ct. App. 1995). There the Court of Appeals held that where a complete account of a crime can be given without referring to the other offense, the offenses are not a single "episode of criminal conduct." [Citation omitted.] . . .

. . . .

The six checks were deposited within the course of the afternoon on October 18, 1996. Looking at the timing of the deposits, we find that they were not "simultaneous" nor were they "contemporaneous" with one another. [Citation omitted.] Defendant went from one bank branch to another branch, with about a half hour to an hour between visits, depositing checks (not in numerical order) for differing amounts of money. . . .

In addition, we can recount each of the forgeries without referring to the other forge ries. Each forgery occurred at a separate time, separate place and for a separate amount of money from the other. We are satisfied that Defendant's conduct does not constitute a single episode of criminal conduct under Indiana Code §35-50-1-2.

. . . .

SHEPARD, C. J., and BOEHM, DICKSON, and RUCKER, JJ., concurred.

CRAWFORD v. STATE, No. 48S00-0103-CR-166, ___ N.E.2d ___ (Ind. June 26, 2002).
BOEHM, J.

Indiana Code section 35-36-2-2 states that when a notice of insanity defense is filed, "the court shall appoint two (2) or three (3) competent disinterested psychiatrists, psychologists endorsed by the state psychology board as health service providers in psychology, or physicians, at least one (1) of whom must be a psychiatrist, to examine the defendant and to testify at trial." The statute is explicit as to when those appointed mental health professionals are to testify at trial: "This testimony shall follow the presentation of the evidence for the prosecution and for the defense, including testimony of any medical experts employed by the state or by the defense." Ind. Code § 35-36-2-2 (1998).

The meaning of this statute is not in doubt. Court-appointed mental health professionals are to testify after the prosecution and defense have concluded their presentations of evidence. We have held as much since at least 1954, when we stated that "it is the clear intent of the statute that an expert appointed by the court shall not be permitted to testify on the subject of the sanity or insanity of the accused until after the presentation of the evidence of the prosecution and the defense." [Citation omitted.] . . .

Because of scheduling conflicts, the trial court called the experts it appointed to examine Crawford before the close of Crawford's case. In so doing, it ignored the statute and controlling precedent. The State contends this was not reversible error because there was no prejudice to Crawford. Crawford argues first that she need not demonstrate prejudice in this case because "[t]o hold otherwise renders the statutory provision so much surplusage which may be disregarded with impunity." She also contends that the trial court's decision prejudiced her case because the witnesses' testimony "was presented at the time when it was most likely to nullify the evidence of the defendant's expert witnesses since it was presented immediately after their testimony."

We agree with Crawford's concerns. The trial court relied on Phelan v. State, 273 Ind. 542, 406 N.E.2d 237 (1980), as a basis for it to proceed despite the statutory mandate and despite the holding of Phelan itself that allowing a court-appointed physician to testify prior to the close of the defendant's case was error. In Phelan we held there was no reversible error because the defendant in that case did not demonstrate prejudice. . . .

Although the trial court presumably meant well in its attempt to accommodate the witnesses' schedules, neither the statute nor case law provides an exception to the mandated witness order in this situation. A court's indifference to clearly stated rules breeds disrespect for and discontent with our justice system. Government cannot demand respect of the laws by its citizens when its tribunals ignore those very same laws. . . .

Although Crawford raises valid concerns, and although a trial court that chooses to disregard the law leaves itself open to disciplinary action, the issue on appeal remains subject to the harmless error standard of review. . . . In sum, Crawford points to nothing showing that the sequence of the evidence likely had a prejudicial effect on the jurors. Although the trial court's error was blatant and intentional, we cannot say it affected Crawford's substantial rights. Retrials involve significant emotional and financial costs to many innocent parties, including witnesses, victims, and their families. In the absence of any showing of prejudice they should not be lightly imposed. Whether this matter is grounds for action in another forum is not for this Court to resolve in the first instance.

. . . .

SHEPARD, C. J., and DICKSON, RUCKER, and SULLIVAN, JJ., concurred.

MILLER v. STATE, No. 49S00-9908-CR-455, ___ N.E.2d ___ (Ind. June 26, 2002).

DICKSON, J.

The evidence indicates that, after being told by friends that the local television news broadcast his name in connection with a recent murder, the defendant voluntarily went to the police station to "get it cleared up." [Citation to Record omitted.] The defendant arrived at 5:30 p.m. and was placed in an interview room and the door was closed. The interview room door automatically locks from the outside when closed. The detective on duty periodically checked on the defendant to see if he needed anything. The defendant was not formally arrested at this time. After the defendant had waited approximately two hours, Indianapolis Police Detective Craig Converse, who was assigned to the case, arrived and began talking to the defendant.

For about one hour, Detective Converse gathered background and preliminary information from the defendant. When the defendant initially denied being at the apartment house where the victim was murdered, which was contrary to the information developed in the police investigation, Detective Converse considered the defendant to be a suspect and orally informed the defendant of his rights. No waiver of rights was signed at this time. Detective Converse's ensuing questioning became more focused and included confronting the defendant with speculation and assertions that misstated or exaggerated information known to the detective. Specifically, Detective Converse told the defendant that witnesses had seen the defendant in the hallway outside the victim's first floor office. But Detective Converse only knew that a witness saw the defendant in the upstairs hallway, and that no witness had stated that the defendant was seen outside the first floor office. In the course of further interrogation, Detective Converse presented the defendant with a fabricated fingerprint card and computer printout and represented that the defendant's fingerprints had been found in the victim's office. In fact, while fingerprints had been recovered at the scene, they had not yet been identified at the time of the interrogation. Detective Converse also showed the defendant the police report that stated that the victim died of natural causes. Detective Converse, knowing that the report was erroneous, nevertheless suggested to the defendant that the death could have been an accident. . . . Just before 1:00 a.m., the defendant acknowledged that he had encountered the victim in her office on the night of her death, that he pushed open the door to her office, she told him to "Get the hell out," and that she then backed up, started to fall, and that he reached out and the subsequent injuries happened. [Citation to Record omitted.]

At this point, about 1:00 a.m., Detective Converse and the defendant took a 45-minute break, during which time the defendant was provided with a soda and the opportunity to use the rest room. He then was left alone in the room until approximately 1:45 a.m., when Detective Converse informed the defendant that he was under arrest and that Detective Converse wanted "to put this on tape," to which the defendant responded "okay." [Citation to Record omitted.]

At the beginning of the videotaped interview, Detective Converse again advised the defendant of his rights, one by one, and after reading each, asked the defendant if he understood it. As to each right, the defendant acknowledged his understanding. In response to the detective's concluding question "What does it mean to you when I tell you your rights?" the defendant responded, "It means that if I didn't want to, you know, say anything, that I can talk to an attorney or I could, you know, come on with (inaudible) you know, to get this cleared up." [Citation to Record omitted.] After then reminding the defendant that he was under arrest and charged with murder, Detective Converse questioned the defendant about the incident. In the ensuing videotaped interview the defendant admitted that, on the day of the killing, he entered the apartment house intending to contact an acquaintance. He entered the structure and knocked on his friend's first floor apartment door. Getting no response, he turned and saw the victim standing in her office door and then closing the door. The defendant then went upstairs to contact another person and, upon his return downstairs to leave the building, he saw the office door again closing. Believing that the victim was trying to overhear his conversations, the defendant pushed open the office door, and the victim said, "Get out of here." [Citation to Record omitted.] He offered the following description of the occurrence to Detective Converse:

> She was standing there, she said, "Get out of here," and started to go back the other way and she was falling and when I, I guess I was trying to keep her from falling and my hand reaction of my hand touched her face and then my chin hit her either when she was going down I was trying to catch her and my fingers must have hit her face and, you know, ... damn.

[Citation to Record omitted.] The defendant then stated that he didn't push her, but that as she went down, she pulled him down and his face fell on top of her, and he hit her with his chin or his head. . . . Shortly thereafter, at approximately 2:35 a.m., the interview was terminated at the request of the defendant who indicated that he wanted to talk to an attorney. [Citation to Record omitted.] At no time during the videotaped portion of the interview did Detective Converse use or refer to any of the speculation, misstatements, or exaggerated information that he asserted during the questioning that preceded the videotaped interview.

At the time of his interrogation, the defendant was forty-years-old and employed, he spoke normally, he did not appear to be incoherent or under the influence of alcohol or drugs. [Citation to Record omitted.] There is no allegation or indication that police knew that he was mentally retarded. The defendant's prior criminal history evidences his familiarity with the criminal justice system. [Citation to Record omitted.] He was twice orally advised of his rights prior to his videotaped statement, and once again at the commencement of his videotaped statement, which advisement he acknowledged and expressly waived. He further demonstrated his awareness of rights when he later requested that the interview stop because he wanted to talk to an attorney.

The trial court denied the motion to suppress, expressly noting its earlier determination that the defendant was mentally retarded, but finding that he freely, voluntarily, and intelligently waived his rights and gave his statement to police. [Footnote omitted.]

. . . .

The defendant contends that the trial court erroneously excluded the testimony of Dr. Richard Ofshe, a psychologist called by the defense as an expert in the field of "social psychology of police interrogation and false confessions." [Citation to Brief omitted.]

. . . .

Out of the jury's presence, the defense questioned Dr. Ofshe regarding the matters it sought to have Dr. Ofshe present to the jury. When the trial court, during the testimony of Dr. Ofshe, expressed concern that his testimony would imply by innuendo that Detective

Converse's interrogation of the defendant produced a coerced confession, [citation to Record omitted], Dr. Ofshe explained:

> The nature of the testimony is going to be: one, about the general way in which police interrogation works which fits the description that Converse gave about the tactics that he used; second, it will be about those things that can lead to someone giving a false confession; and third, it will be about how to take the undisputed record of the interrogation, the recorded part of it and analyze it, in terms of trying to figure out what is – what the indicia of a true or false confession might be – and thereby for the jurors to reach their decision about how much weight to give it. My role is only to point out what things ought to be considered.

[Citation to Record omitted.] The defense then called Detective Converse to the stand and questioned him about the defendant's interrogation, and then recalled Dr. Ofshe, asking him whether Detective Converse's testimony provided "any characteristics . . . or phenomena of false confessions or police interrogation in your area of study . . ." [Citation to Record omitted.] Dr. Ofshe replied:

> He identified the two principle things that go into the analysis of police interrogation. . . . First, he talks about the use of the fingerprints, for example. That's what I refer to in my writings as an evidence ploy, bringing before someone information that contradicts what they have previously been saying, that places them in involvement at a the crime scene, whether that evidence is true or that evidence is false, it is what – what I refer to as an evidence ploy, so as not to restrict it to whether it's true or false. It's an evidence ploy because it's used tactically. It is used tactically in order to move the person off the position that they had previously been maintaining by showing them that it's hopeless to maintain that you aren't involved in this. And the use of evidence ploys is the principal way in which someone who is – initially says, "I didn't do it; I wasn't there" is gotten to recognize that it's hopeless to maintain that position, and that's crucial to understanding how it is you get someone to say, "Okay, I did it." The second thing that Converse described was the use of his pointing out that this was just a natural death and he used the word "accident" in that. That's again a motivational tactic. The object is to make the suspect believe that the police officer is willing to believe a characterization of what happened that is less heinous, less morally reprehensible and also carries the implication of—of a less serious and perhaps even borderline or perhaps even carrying no punishment uh—for having committed the acts because it's sometimes characterized as self-defense, for example. So Converse has already illustrated the two principal components of modern police interrogation. The other things uh – I'm also aware that he acknowledges he was friendly. He tried to develop rapport. He tries to—to tell Mr. Miller that he only wants to get to the truth and he confronts Mr. Miller when he believes or knows that Mr. Miller is lying with evidence ploys designed to move him in the direction of admitting that he was there.

[Citation to Record omitted.] After the evidence on the motion was completed, the trial court concluded that there was no dispute in the evidence regarding "the officer's interrogation," [citation to Record omitted], and expressed concern that the witness's testimony would be "questioning the truth and veracity of a witness, . . . the police officer," [citation to Record omitted.] It ruled, "I'm not going to permit the testimony for that reason." [Citation to Record omitted.] The defendant supplemented the hearing on the State's motion in limine with an offer to prove. [Citation to Record omitted.] This offer included further testimony from Dr. Ofshe regarding his expertise and extensive writings in the area of police interrogation and false confession and a description of modern police interrogation technique. Dr. Ofshe described evidence ploys based on psychological principals used to "drive [a suspect's] confidence down to the point where they think it is virtually certain" that they will be arrested, tried, and convicted. [Citation to Record omitted.] He also explained the tactic of "maximization/minimization" or "the accident strategy" which is "intended to

make it easier for the person to say 'I did it.'" [Citation to Record omitted.] Dr. Ofshe then stated that "police are trained to try to get corroboration in the post-admission narrative," explaining the efforts to obtain details from the suspect that are consistent with the known facts of the crime. [Citation to Record omitted.] Dr. Ofshe testified, "There are innumerable demonstrated cases of people confessing to crimes, being convicted, and subsequently being exonerated." [Citation to Record omitted.] He also asserted that the "mentally handicapped are more suggestible and more likely to give a false confession," stating that they are "easier to manipulate," less able to appreciate long-range consequences, easier to persuade to see the facts as asserted by the interrogator, and easier "to get to give both true and false confessions." [Citation to Record omitted.]

Because the trial court did not reverse his earlier ruling, Dr. Ofshe did not present any testimony to the jury.

. . . Acknowledging that there is no evidentiary dispute regarding whether Detective Converse confronted the defendant with speculation and assertions that misstated or exaggerated information known to police, the defendant argues that he was entitled to present expert testimony regarding the psychology of false confessions that would enable the jury to understand why the mentally retarded defendant "would succumb to the lies" even though he was innocent. [Citation to Brief omitted.]

The State argues that the court properly excluded the testimony because the facts of the interrogation were not in dispute and because the jury would understand the expert's testimony to pertain to Det. Converse's interrogation of the defendant in this case. In the alternative, the State argues that the exclusion of the proffered evidence was harmless.

We first observe that a trial court's determination that a defendant's statement was voluntary and admissible does not preclude the defense from challenging its weight and credibility.

> [T]he trial court must make a preliminary factual determination of voluntariness when assessing the statement's admissibility. The jury, however, remains the final arbiter of all factual issues under Article 1, Section 19 of the Indiana Constitution. Even if the court preliminarily determines that the statement is voluntary and admits it for the jury's consideration, then the defendant is still entitled to dispute the volunariness of the statement once it is presented to the jury. Although the court has previously determined voluntariness in connection with the statement's admissibility, the jury may find that the statement was involuntarily given. If the jury makes such a determination, then it should give the statement no weight in deciding the defendant's guilt or innocence.

[Citation omitted.] Expert testimony is appropriate when it addresses issues not within the common knowledge and experience of ordinary persons and would aid the jury. [Citation omitted.] . . .

The testimony of Dr. Ofshe regarding police interrogation was also at issue in Callis v. State, 684 N.E.2d 233 (Ind. Ct. App. 1997) . . . . [Citation omitted.] At the trial of Callis, Dr. Ofshe testified without objection about false confessions generally, but the trial court sustained the State's objection when he was asked his opinion about the interrogation process in Callis's case. In Callis's offer of proof, Dr. Ofshe testified that "there was a 'great dispute between the accounts' of Callis and the witnessing officers, that 'we have three different versions of an inculpatory statement . . . all of which are denied by Mr. Callis," and that "[s]omeone is telling the truth and someone is lying, and there's no way to reconcile those two things.'" [Citation omitted.] The Court of Appeals affirmed the trial court's ruling, stating:

> We conclude that the trial court properly admitted Ofshe's testimony regarding the phenomenon of coerced confessions and properly excluded his opinion about Callis's interrogation. . . .

[Citation omitted.] . . .

In the present case, the fact that the content of the interrogation was not in dispute is not a proper basis on which to exclude Dr. Ofshe's testimony. The defendant's trial strategy clearly included his challenge to the voluntariness of the incriminatory statements in his videotaped police interview. The trial court's threshold determination of sufficient voluntariness for admissibility of the videotape did not preclude the defendant's challenge to its weight and credibility at trial. From our review of the circumstances in the present case, the general substance of Dr. Ofshe's testimony would have assisted the jury regarding the psychology of relevant aspects of police interrogation and the interrogation of mentally retarded persons, topics outside common knowledge and experience. In the event that some of Dr. Ofshe's testimony to the jury would have invaded Rule 704(b)'s prohibition of opinion testimony as to the truth or falsity of the defendant's statements, the trial court could have sustained individualized objections at trial. We hold that excluding the proffered expert testimony in its entirety deprived the defendant of the opportunity to present a defense.

The State argues that the exclusion of Dr. Ofshe's testimony was harmless because the defendant's presence in the victim's office was established by evidence that his fingerprint was found in what appeared to be blood on a plastic bag at the scene. This is not inconsequential evidence. We note, however, that during final argument the State placed great emphasis upon the defendant's videotaped statements, including replaying part of the videotape to the jury and directing the jury's attention to a point during the videotape where "the defendant puts his hands up to Detective Converse's head and shows you how he strangled Anna Pennington." [Citation to Record omitted.] Given the prominence of the defendant's statement in the State's case and the unique circumstances present, we find that the erroneous exclusion of the whole of Dr. Ofshe's testimony affected the substantial rights of the defendant. The defendant is entitled to a new trial. [Footnote omitted.]

. . . .

SHEPARD, C. J., and RUCKER and SULLIVAN, JJ., concurred.

BOEHM, J., filed a separate written opinion in which he concurred, in part, as follows:

I concur in the majority opinion. I write separately to note that the admissibility of Dr. Ofshe's testimony under Indiana Evidence Rule 702 was not addressed by Miller or the State. Jurisdictions that have considered the admissibility of expert testimony as to false confessions under various versions of Evidence Rule 702 have split on that issue. [Citations omitted.]

WESTBROOK v. STATE, No. 18A02-0109-CR-626, ___ N.E.2d ___ (Ind. Ct. App. June 25, 2002).

BAILEY, J.

[W]estbrook contends that the violent sexual predator determination was erroneous in light of the conflicting written opinions of Drs. Joy and Buckles and the absence of testimonial opinions. Both experts opined in written reports that Westbrook is a sexual predator, but Dr. Buckles opined that Westbrook should not be classified as a violent sexual predator. Westbrook requested but was denied the opportunity to cross-examine these experts.

Indiana Code section 35-38-1-7.5(c) provides:

> At a sentencing hearing, the court shall determine whether the person is a sexually violent predator. Before making a determination under this section, the court shall consult with a board of experts consisting of two (2) board certified psychologists or psychiatrists who have expertise in criminal behavioral disorders.

The primary goal of statutory interpretation is to give effect to the intention of the legislature. [Citation omitted.] . . . The statute at issue here only requires the court to consult with experts. The opinions of the experts are not binding upon the trial court and unanimity is not required. Neither does the statute require a contested hearing in light of expert disagreement. We will not construe the statute so as to impose such additional burdens on the trial court in reaching its determination. Here, the trial court's determination is supported both by Westbrook's criminal record and an expert opinion. We find no error.

NAJAM and ROBB, JJ., concurred.

CIVIL LAW ISSUES

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NO. 92 OF POTTAWATOMIE COUNTY v. EARLS, No. 01-332, ___ U.S. ___ (June 27, 2002).

THOMAS, J.

The city of Tecumseh, Oklahoma, is a rural community located approximately 40 miles southeast of Oklahoma City. The School District administers all Tecumseh public schools. In the fall of 1998, the School District adopted the Student Activities Drug Testing Policy (Policy), which requires all middle and high school students to consent to drug testing in order to participate in any extracurricular activity. In practice, the Policy has been applied only to competitive extracurricular activities sanctioned by the Oklahoma Secondary Schools Activities Association, such as the Academic Team, Future Farmers of America, Future Homemakers of America, band, choir, pom pon, cheerleading, and athletics. Under the Policy, students are required to take **[*9]** a drug test before participating in an extracurricular activity, must submit to random drug testing while participating in that activity, and must agree to be tested at any time upon reasonable suspicion. The urinalysis tests are designed to detect only the use of illegal drugs, including amphetamines, marijuana, cocaine, opiates, and barbituates, not medical conditions or the presence of authorized prescription medications.

*** * * ***

In *Vernonia*, this Court held that the suspicionless drug testing of athletes was constitutional. The Court, however, did not simply authorize **[*16]** all school drug testing, but rather conducted a fact-specific balancing of the intrusion on the children's Fourth Amendment rights against the promotion of legitimate governmental interests. See 515 U.S. at 652-653. Applying the principles of *Vernonia* to the somewhat different facts of this case, we conclude that Tecumseh's Policy is also constitutional.

*** * * ***

A student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety. Schoolchildren are routinely required to submit to physical examinations and vaccinations against disease. See id., at 656. Securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults. See *T. L. O.*, *supra,* 469 U.S. at 350 (Powell, J., concurring) ("Without first establishing discipline and maintaining order, teachers cannot begin to educate their students. And apart from education, the school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern").

Respondents argue that because children participating in nonathletic extracurricular activities are not subject to regular physicals and communal undress, they have a stronger expectation of privacy than the **[*18]** athletes tested in *Vernonia*. See Brief for Respondents 18-20. This distinction, however, was not essential to our decision in

Vernonia, which depended primarily upon the school's custodial responsibility and authority.

[S]tudents who participate in competitive extracurricular activities voluntarily subject themselves to many of the same intrusions on their privacy as do athletes. n4 Some of these clubs and activities require occasional off-campus travel and communal undress. All of them have their own rules and requirements for participating students that do not apply to the student body as a whole. 115 F. Supp. 2d at 1289-1290. For example, each of the competitive extracurricular activities governed by the Policy must abide by the rules of the Oklahoma Secondary Schools Activities Association, and a faculty sponsor monitors the students for compliance with the various rules dictated by the clubs and activities. See id. at 1290. This regulation of extracurricular activities further diminishes the expectation of privacy among schoolchildren. Cf. Vernonia, *supra,* 515 U.S. at 657 ("Somewhat like adults who choose to participate in a closely regulated industry, students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy" (internal quotation marks omitted)). We therefore **[*20]** conclude that the students affected by this Policy have a limited expectation of privacy.

* * * *

Next, we consider the character of the intrusion imposed by the Policy. See *Vernonia, supra,* at 658. Urination is "an excretory function traditionally shielded by great privacy." *Skinner*, 489 U.S. at 626. But the "degree of intrusion" on one's privacy caused by collecting a urine sample "depends upon the manner in which production of the urine sample is monitored." *Vernonia*, *supra,* 515 U.S. at 658.

Under the Policy, a faculty monitor waits outside the closed restroom stall for the student to produce **[*21]** a sample and must "listen for the normal sounds of urination in order to guard against tampered specimens and to insure an accurate chain of custody." App. 199. The monitor then pours the sample into two bottles that are sealed and placed into a mailing pouch along with a consent form signed by the student. This procedure is virtually identical to that reviewed in *Vernonia*, except that it additionally protects privacy by allowing male students to produce their samples behind a closed stall. Given that we considered the method of collection in *Vernonia* a "negligible" intrusion, 515 U.S., at 658, the method here is even less problematic.

In addition, the Policy clearly requires that the test results be kept in confidential files separate from a student's other educational records and released to school personnel only on a "need to know" basis. . . . .

Moreover, the test results are not turned over to any law enforcement authority. Nor do the test results here lead to the imposition of discipline or have any academic consequences. Cf. *Vernonia*, *supra,* at 658, and n. 2. Rather, the only consequence of a failed drug test is to limit the student's privilege of participating in extracurricular activities. . . .

Finally, this Court must consider the nature and immediacy of the government's concerns and the efficacy of the Policy in meeting them. See *Vernonia*, 515 U.S., at 660. This Court has already articulated in detail the importance of the governmental concern in preventing drug use by schoolchildren. See *id*., at 661-662. The drug abuse problem among our Nation's youth has hardly abated since *Vernonia* was decided in 1995. In fact, evidence suggests **[*24]** that it has only grown worse. n5 As in *Vernonia*, "the necessity for the State to act is magnified by the fact that this evil is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction." *Id.*, at 662. The health and safety risks identified in *Vernonia* apply with equal force to Tecumseh's children. Indeed, the nationwide drug epidemic makes the war against drugs a pressing concern in every school.

* * * *

[T]his Court has not required a particularized or pervasive drug problem before allowing the government to conduct suspicionless drug testing. For instance, in *Von Raab* the Court upheld the drug testing of customs officials on a purely preventive basis, without any documented history of drug use by such officials. See 489 U.S. at 673. In response to the lack of evidence relating to drug use, the Court noted generally that "drug abuse is one of the most serious problems confronting our society today," and that programs to prevent and detect drug use among customs officials could not be deemed unreasonable. *Id.* at 674; cf. *Skinner*, 489 U.S. at 607, and n. 1 (noting nationwide studies that identified on-the-job alcohol and drug use by railroad employees). Likewise, the need to prevent and deter the substantial harm of childhood drug use [*27] provides the necessary immediacy for a school testing policy. Indeed, it would make little sense to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program designed to deter drug use.

Given the nationwide epidemic of drug use, and the evidence of increased drug use in Tecumseh schools, it was entirely reasonable for the School District to enact this particular drug testing policy. We reject the Court of Appeals' novel test that "any district seeking to impose a random suspicionless drug testing policy as a condition to participation in a school activity must demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students will actually redress its drug problem." 242 F.3d at 1278. Among other problems, it would be difficult to administer such a test. As we cannot articulate a threshold level of drug use that would suffice to justify a drug testing program for schoolchildren, we refuse to fashion what would in effect be a constitutional quantum of drug use necessary to show a [*28] "drug problem."

Respondents also argue that the testing of nonathletes does not implicate any safety concerns, and that safety is a "crucial factor" in applying the special needs framework. Brief for Respondents 25-27. They contend that there must be "surpassing safety interests," *Skinner*, *supra,* 489 U.S. at 634, or "extraordinary safety and national security hazards," *Von Raab*, *supra,* 489 U.S. at 674, in order to override the usual protections of the Fourth Amendment. See Brief for Respondents 25-26. Respondents are correct that safety factors into the special needs analysis, but the safety interest furthered by drug testing is undoubtedly substantial for all children, athletes and nonathletes alike. We know all too well that drug use carries a variety of health risks for children, including death from overdose.

REHNQUIST, C. J., and SCALIA, KENNEDY, and BREYER, JJ., concurred. BREYER, J., filed a concurring opinion. O'CONNOR, J., filed a dissenting opinion, in which SOUTER, J., joined. GINSBURG, J., filed a dissenting opinion, in which STEVENS, O'CONNOR, and SOUTER, JJ., joined.

IN RE THE GUARDIANSHIP OF B. H., No. 67S05-0101-JV-36, ___ N.E.2d ___ (Ind. June 21, 2002).

DICKSON, J.

Despite the differences among Indiana's appellate court decisions confronting child placement disputes between natural parents and other persons, most of the cases generally recognize the important and strong presumption that the child's best interests are ordinarily served by placement in the custody of the natural parent. This presumption does provide a measure of protection for the rights of the natural parent, but, more importantly, it embodies innumerable social, psychological, cultural, and biological considerations that significantly benefit the child and serve the child's best interests. To resolve the dispute in the caselaw regarding the nature and quantum of evidence required to overcome this presumption, we hold that, before placing a child in the custody of a person other than the natural parent, a trial court must be satisfied by clear and convincing evidence that the best interests of the child require such a placement. The trial court must be convinced that

placement with a person other than the natural parent represents a substantial and significant advantage to the child. The presumption will not be overcome merely because "a third party could provide the better things in life for the child." Hendrickson, [v. Binkley]161 Ind. App. [388] at 396, 316 N.E.2d [376] at 381 [1974]. In a proceeding to determine whether to place a child with a person other than the natural parent, evidence establishing the natural parent's unfitness or acquiescence, or demonstrating that a strong emotional bond has formed between the child and the third person, would of course be important, but the trial court is not limited to these criteria. The issue is not merely the "fault" of the natural parent. Rather, it is whether the important and strong presumption that a child's interests are best served by placement with the natural parent is clearly and convincingly overcome by evidence proving that the child's best interests are substantially and significantly served by placement with another person. This determination falls within the sound discretion of our trial courts, and their judgments must be afforded deferential review. A generalized finding that a placement other than with the natural parent is in a child's best interests, however, will not be adequate to support such determination, and detailed and specific findings are required. [Citation omitted.]

. . . .

The trial court's findings of fact and conclusions of law indicate that it relied on many factors in determining that the stepfather should be appointed guardian of the children: the estranged relationship between the children and their father and his lack of any significant interaction with them since his 1991 separation from their mother; the failure of the father to stay current in paying his child support for the children; instances of abuse before the separation and the father's violent confrontation with the children's maternal aunt after the separation; the father's history of excessive drinking that resulted in an arrest for driving while intoxicated in 1998 and a citation for public intoxication after he moved to Houston, Texas in 1996; the stepfather's role as the only psychological father the children have known since December 1991; the children's connections with the community and the proximity of extended family provided by placement with the stepfather; the teenaged children's strong desire to remain in Indiana with the stepfather; the recommendations of the CASA report and the children's psychotherapist that it is in the best interests of the child to remain in Indiana with the stepfather; and the stepfather's role as the primary source of financial support for the children for the previous four years.

These detailed findings provide ample support for the judgment of the trial court in granting the stepfather's guardianship petition. . . .

. . . .

BOEHM and RUCKER, JJ., concurred.

SHEPARD, C. J., filed a separate written opinion in which he concurred in the result and in which SULLIVAN, J., joined, in part, as follows:

The apparent object of Justice Dickson's opinion is to disapprove the rather casual approach to taking children away from parents represented by Attebury [v. Atteberry, 597 N.E.2d 355 (Ind. Ct. App. 1992)] and other opinions in the Turpen [v. Turpen, 537 N.E.2d 537 (Ind. Ct. App. 1989)] line of cases. Instead, today's opinion says, courts may place a child with a non-parent only when a rigorous standard is met.

. . .

I embrace the objective of requiring a rather considerable showing to overcome the natural parent. I do not join today's opinion, however, because I think what the Court ends up saying about the required showing actually weakens the parental presumption as it has usually been applied by us and by the Court of Appeals over the last five generations.

. . . .

I think the Gilmore [v. Kitson, 165 Ind. 402, 74 N. E.1083 (1905)] /Hendrickson line of cases has served well historically and serves well for the case before us.

Today's opinion abandons that tether, in favor of a regime under which any old facts may suffice.

RANSBURG v. RICHARDS, No. 29A05-0101-CV-25, ___ N.E.2d ___ (Ind. Ct. App. June 20, 2002).

BARNES, J.

In May 1995, Richards leased an apartment at Twin Lakes. The written lease agreement provided that Twin Lakes would "gratuitously" maintain the common areas. Appendix p. 78. The lease agreement further provided that Richards' use of the Twin Lakes facilities, including the parking lot, would be at "[her] own risk." Appendix p. 78. In addition, the lease agreement provided that Twin Lakes was not liable for damages to persons or property even if such damages were caused by Twin Lakes' negligence. . . .

In the early morning hours of January 28, 1999, it snowed approximately two inches. When Richards left her apartment that morning, she noticed that the sidewalk had been cleared. It also appeared that the parking lot had been plowed and cleared. As Richards walked across the parking lot to her car, she slipped and fell on snow-covered ice.

. . . .

Resolving the question of whether this lease provision is void as against public policy turns on fairly balancing the parties' freedom to contract against the policy of promoting responsibility for damages caused by one's own negligent acts. . . .

. . . .

Because the question of whether exculpatory clauses in residential leases insulating landlords from liability for personal injuries purportedly caused by the landlords' negligence are void as against public policy has never been specifically addressed in Indiana, we look to the other jurisdictions that have considered this issue and reached differing conclusions. There is no majority rule on this issue, "only numerous conflicting decisions, decisions concerned with contracts of indemnity, cases relating to property damage under business leases, and a disposition of the courts to emasculate such exculpatory clauses by means of strict construction." [Citation omitted.]

. . . .

With these thoughts in mind, we conclude that the five factors outlined by our supreme court weigh in favor of not enforcing this type of clause in residential leases. Those factors include: (i) the nature of the subject matter of the contract; (ii) the strength of the public policy underlying the statute; (iii) the likelihood that refusal to enforce the bargain or term will further that policy; (iv) how serious or deserved would be the forfeiture suffered by the party attempting to enforce the bargain; and (v) the parties relative bargaining power and freedom to contract. Trotter [v. Nelson], 684 N.E.2d [1150] at 1152-53 [(Ind. 1997)]. Given the vast number of people clauses like these affect, the inequality of bargaining power caused by the need for housing, the fact that people who are not parties to the contracts could suffer as a result of such clauses, and the desire to promote responsible maintenance by landlords to avoid personal injuries by tenants and third parties, we find that the factors weigh in favor of public policy. Based on the foregoing, we conclude that the exculpatory clause in this residential lease is contrary to public policy insofar as it seeks to immunize Ransburg against damages caused by her negligence, if any, in maintaining common areas. [Footnote omitted.] . . .

. . . .

DARDEN, J., concurred.

NAJAM, J., filed a separate written opinion in which he dissented.

I respectfully dissent. The majority opinion nullifies a valid private agreement, rewrites the lease, and reallocates the exchange of costs and benefits between the parties. . . .

. . . .

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